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No. 89-1027

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,  
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,  
*Respondents.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The District Of Columbia Circuit

**PETITIONERS' SUPPLEMENTAL RESPONSE  
TO MOTION TO DISMISS**

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September 28, 1990

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### ARGUMENT

This case was not moot when respondent American Train Dispatchers Association ("ATDA") filed its motion to dismiss the writ of certiorari, and it is not moot now.<sup>1</sup> The lawsuit began when ATDA sought reversal of an Interstate Commerce Commission ("ICC") decision affirming an arbitration award that

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<sup>1</sup> ATDA filed its motion to dismiss on May 24, 1990 and petitioners filed a response on June 1, 1990. On June 20, 1990, the Court delayed further consideration of the motion for 120 days. On September 19, 1990, ATDA filed a supplemental memorandum in support of its motion ("Supp. Mem.").

had imposed an implementing agreement, governing the transfer of certain work, upon ATDA and petitioners Norfolk and Western Railway Company ("NW") and Southern Railway Company ("Southern"). In upholding the award, the ICC concluded, *inter alia*, that the exemption "from all other law" contained in 49 U.S.C. § 11341(a) provided authority for the modification of collective bargaining agreements that ATDA alleged had occurred.

In its June 21, 1990 decision on remand from the Court of Appeals, 6 I.C.C.2d 715 (the "Remand Decision"), the ICC, no longer able to rely on this legal support because of the Court of Appeals' erroneous holding that § 11341(a) does not reach collective bargaining agreements, vacated the arbitration award it had earlier affirmed and left the parties to attempt to negotiate a new implementing agreement, 6 I.C.C.2d at 757.<sup>2</sup> The Remand Decision found in 49 U.S.C. § 11347 a source of authority on which an arbitrator formulating an implementing agreement could rely in deciding whether to modify collective bargaining agreements to permit the approved transaction. 6 I.C.C.2d at 752-54. But the ICC also found this § 11347 authority to be circumscribed in ways that would not be applicable under the blanket exemption conferred by § 11341(a) itself. Far from rendering the case moot, the ICC's action on remand jeopardizes the previously arbitrated solution and

<sup>2</sup> The Federal Respondents have previously filed a copy of the Remand Decision with the Court.

NW, Southern, and CSX Transportation, Inc. ("CSXT") (petitioner in No. 89-1028) have petitioned the ICC to reopen and reconsider or clarify the Remand Decision; those petitions remain pending before the ICC.

leaves the controversy between the union and railroad parties very much alive.

Contrary to ATDA's assertions (Supp. Mem. at 4), the proper meaning to be given § 11341(a) obviously has not become "virtually irrelevant" to the resolution of the parties' continuing dispute. According to ATDA, the Remand Decision purportedly has "shifted the focus" away from the reach of § 11341(a) in favor of the scope of the ICC's authority under § 11347. ATDA simply disregards that the approach to this case adopted by the ICC on remand is entirely the product of the ICC's obligation to comply with the Court of Appeals' mandate. The Remand Decision itself leaves no doubt that the ICC's decision to rely on § 11347 as the source of the authority to modify collective bargaining agreements, and not on § 11341(a) as before, was compelled by the law of the case. 6 I.C.C.2d at 722, 745, 750, 756 n.34. And the Remand Decision goes on specifically to observe that the ICC is arguing in this Court that the Court of Appeals' interpretation of § 11341(a), in this respect, is "in error." 6 I.C.C.2d at 756 n.34. Nothing in the Remand Decision suggests that a ruling by this Court that § 11341(a) applies to collective bargaining agreements would be irrelevant to the ICC's determining anew the true extent of its Interstate Commerce Act powers under both § 11347 and § 11341(a).

Indeed, the ICC has made clear that if this Court were to reverse the decision of the Court of Appeals, a result the ICC urges here, the ICC will be required to reexamine the reasoning and approach adopted in the Remand Decision. In its July 20, 1990 decision denying petitioners' request for a stay of the effectiveness of the Remand Decision ("Stay Decision"),



a decision that is nowhere mentioned in ATDA's supplemental memorandum, the ICC reiterates that it is "obliged . . . as a matter of law" to defer to the mandate of the Court of Appeals "unless and until we are successful in having that view declared erroneous by the Supreme Court," Pet. Supp. Resp. App. (No. 89-1028) at 10a.<sup>3</sup> The ICC then goes on to explain that, as compared with the position it adopted in the Remand Decision, "we are asserting more expansive Section 11341(a) authority before the Supreme Court. 6 I.C.C.2d at 756 n. 34. If that Court should rule that the *Carmen* court was in error, we would, of course, consider the appropriate scope of our authority under Section 11341(a)." Pet. Supp. Resp. App. (No. 89-1028) at 10a.<sup>4</sup>

<sup>3</sup> A copy of the Stay Decision is reproduced in the Appendix to Petitioner's Supplemental Response To Motion To Dismiss, filed by petitioner CSXT in No. 89-1028 in September 1990. Citations in the form "Pet. Supp. Resp. App. (89-1028) at \_\_\_\_" refer to that Appendix.

<sup>4</sup> The ICC has also made clear that it would have to reconsider any suggestion in the Remand Decision that the reach of § 11341(a) is merely coextensive with the ICC's authority under § 11347, see 6 I.C.C.2d at 754, if this Court were to reverse the Court of Appeals' decision. Thus, in its Stay Decision, the ICC notes that it does "not disagree" with the following statement made by CSXT in its response to the motion to dismiss filed by the union respondent in No. 89-1028:

If the Supreme Court rules, as both CSXT and the Commission have urged, that § 11341(a) broadly immunizes CSXT from compliance with "all legal obstacles", the Commission will need to reconsider its decision that such broad immunity was intended by Congress to be restricted nonetheless by a requirement that it be balanced with the obligations flowing

In the circumstances, it is evident that the dispute over the proper scope of the § 11341(a) exemption remains live, continuing, and of real consequence; its resolution will affect the rights of the railroad and union parties in this case. ATDA's contentions notwithstanding, the ICC's effort to comply with the mandate of the Court of Appeals neither makes this case moot nor prevents this Court from taking action to correct the Court of Appeals' mistaken decision. See *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 791 n.1 (1985); *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 136 n.2 (1985) (Marshall, J., dissenting); *Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977).<sup>5</sup>

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from collective bargaining agreements.

Pet. Supp. Resp. App. (No. 89-1028) at 10a n.9.

<sup>5</sup> Indeed, although ATDA now says that the meaning of § 11341(a) is no longer in the case, ATDA took just the opposite position in the Court of Appeals in its August 3, 1990 petition for a special writ requiring the ICC to conform its decision on remand to the decision of the Court of Appeals that is now before this Court. There, ATDA asserted that, notwithstanding the ICC's purported reliance on § 11347 as the source of authority to override agreements, § 11341(a) was necessarily at the heart of the Remand Decision

because the necessary statutory underpinning to any exercise of Section 11347 authority to override the RLA, must be Section 11341(a) and this court has already addressed the scope of that section's authority with respect to RLA agreements.

Pet. Supp. Resp. App. (89-1028) at 26a.

**CONCLUSION**

The motion to dismiss should be denied.

Respectfully submitted,

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